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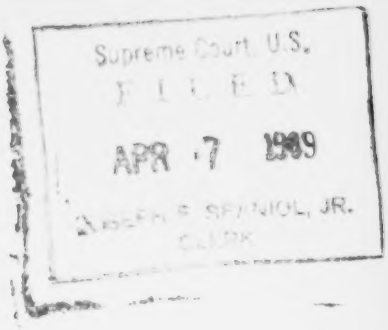

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DOUGLAS B. VADEN, Petitioner,

v.

STATE OF ALASKA

PETITION FOR WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether government conduct amounts to an abuse of power an is outrageous government conduct prohibiting prosecution as a violation of the Due Process Clause of The Fourteenth Amendment To The United States Constitution where an undercover operative:

   a. violates the law in falsifying public documents to support his "cover'; and

   b. violates the law in shooting four foxes from an aircraft; and

   c. violates the law in shooting four foxes out of season.

2. Whether government conduct amounts to an abuse of power and is

outrageous government conduct prohibiting prosecution as a violation of the Due Process Clause of the Fourteenth Amendment where an undercover operative violates the law, as a principal, for the purpose of implicating and convicting a citizen as an accomplice.

3. Whether government conduct amounts to an abuse of power and is outrageous government conduct prohibiting prosecution as a violation of the Due Process Clause when a government agent illegally kills game and causes a citizen to transport said game in violation of the law.

PARTIES

The caption indicates all parties to this petition. At the court below, another case was consolidated and considered with that of Mr. Vaden. The parties to the other case were The State of Alaska and Floyd Saltz, Jr. It is unknown as to whether Mr. Saltz intends to petition the United States Supreme Court. This petition applies only to Mr. Vaden. It is Mr. Vaden's belief that Mr. Saltz has no interest in the outcome of the petition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

DOUGLAS B. VADEN

v.

STATE OF ALASKA

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF ALASKA

Douglas B. Vaden, your petitioner, prays that a writ of certiorari issue to review the judgment of the State of Alaska Supreme Court in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Alaska (App. A, infra., pp. a-2 through a-32) is not yet reported. The opinion of the State of Alaska Court of Appeals (App. A, infra., pp. a-33 through a-45) is reported at 742 P. 2d 784.

JURISDICTION

The judgment of the Supreme Court of the State of Alaska (infra, App. A, pp. a-2 through a-51) was entered on February 10, 1989. No request for a rehearing was filed and the time for making such a request has elapsed. Said judgment is now final.

Federal Constitutional questions were raised as indicated at pp. 6-13, infra.

The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDIANCES, AND REGULATIONS WHICH THE CASE INVOLVES

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which is set out in the appendix (App. B, p. b-1).

This case involves 28 U.S.C. 1257(a) which is set out in the appendix (App. B, p. b-1).

This case involves the following Alaska Statutes: AS 16.05.420; AS 16.05.430; and AS 16.05.900. Each is set out in the appendix (App. B, pp. b-2 through b-3).

This case also involves the following Alaska Regulations: 5 AAC 81.072(4); 5 AAC 81.330(4); and 5 AAC 81.140(c). Each is set out in the appendix (App. B, p. b-3).

No Treaties or ordinances are involved.

STATEMENT OF THE CASE

In the Spring of 1984, Alaska Master Guide Douglas B. Vaden operated a hunting camp located on the White River in Alaska's Wrangell Mountains. Mr. John Snell, an experienced undercover agent with the Wyoming Attorney General's Office, employed Mr. Vaden to act as guide in a contemplated hunt for bear and wolf. He did so at the

request of Alaska Department of Fish and Game. The purpose of the hunt was to gather evidence of wrongdoing by Mr. Vaden. Accordingly, at all times relevant to this case, Mr. Snell operated under the alias of "Rudy Mozanga."

Upon arriving in Alaska, Mr. Snell falsified two official state documents (hunting license and big game tag) by attesting that his name was "Rudy Mozanga". In Alaska, the falsification of such documents is a misdeameanor pursuant to AS 16.05.420 and AS 16.05.430.

On April 14, 1984, Agent Snell met Mr. Vaden in Anchorage and traveled with him to Mr. Vaden's hunting camp. Three days later, on April 17, 1984, Agent Snell shot and killed four foxes from an aircraft being piloted by Mr. Vaden. Mr. Snell secured the hides of three of the foxes and caused them to be transported in Mr.

Vaden's aircraft to the hunting camp. Later, he caused all four hides to be transported to Anchorage in another aircraft owned by Mr. Vaden.

On approximately May 5, 1984, the hunting terminated and Mr. Snell reported to Alaska Fish and Game officers in Anchorage. Subsequently, as a result of Mr. Snell's investigation, a total of fifty-three criminal charges were brought against Mr. Vaden. After several charges had been dismissed, forty counts were tried to a jury in Glennallen, Alaska, on October 2, 1985. The jury acquitted Mr. Vaden on twenty-nine of the charges and convicted him on eleven counts.

In four of the eleven counts, Mr. Vaden was convicted, as an accomplice, of taking foxes from an aircraft in violation of 5AAC 81.072(4), which proscribes the taking of game from mechanical vehicles.

In four counts, Mr. Vaden was found guilty, as an accomplice, of taking fox out of season in violation of 5 AAC 81.330(4), which defined the fox hunting season as November 1st to February 15th. In three counts, Mr. Vaden was convicted, as a principal, of violating 5 AAC 81.140(c), which proscribes the possession or transportation of illegally taken game. All convictions are misdemeanors. AS 16.05.900. Thus, all eleven convictions flow directly from the killing of the four foxes by Agent Snell. Prior to trial, Mr. Vaden moved to dismiss on entrapment grounds, alleging unconscionable police conduct (R. 61-65), which motion was denied (R. 90). Subsequently, he renewed and supplemented this motion by alleging a violation of Due Process (R. 98-109), and, after an evidentiary hearing the renewed motion was denied (R. 111-134). Later,

after the trial, Mr. Vaden moved for a new trial, which motion was based in part on a violation of Due Process arising from unconscionable police conduct. (R. 220-261). This motion also was denied. A more detailed account of the various motions and a summary of the record indicating how the federal question was raised follows:

On September 14, 1984, Petitioner moved the Trial Court to dismiss the counts now under consideration on the grounds of entrapment. This motion was based on the following grounds: 1) Agent Snell violated the law in perjuring himself and shooting game; 2) The defendants offenses came about through the creative activity of the government; 3) The government permitted itself to become enmeshed in criminal activity from beginning to end

which is repugnant to the American Criminal Justice System; and, 4) Any criminal acts committed by Mr. Vaden were due to an intolerable degree of governmental inducement and participation. (R. p. 61-67). This motion was orally denied. (R. 90).

On September 16, 1985, Petitioner filed a supplemental motion to dismiss, based, in part, on entrapment and outrageous governmental conduct. He argued that courts shouldn't sanction the activities or participation of government agents in activities that result in injury to the rights of its citizens. He further argued, in part, that Mr. Snell falsified public records and, in order to charge Mr. Vaden, as an aider and abettor, Mr. Snell perpetrated the actual killing of the game. Such acts are outrageous, shocking, and violative of the concept of fundamental

fairness. Accordingly, it was argued that Mr. Vaden's rights of Due Process had been violated. In support of his position, Mr. Vaden cited, among others, United States v. Twigg, infra.; United States v. Russell, infra.; Green v. United States, infra.

After an evidentiary hearing, Mr. Vaden's Motion was orally denied (R. pp. 111-134), and the following day the matter went to trial.

On December 18, 1985, a motion for a new trial was filed by Mr. Vaden (R. pp. 220-226) based, in part, on Due Process grounds. Said motion was denied.

An appeal subsequently was taken to the Alaska Court of Appeals, which voted to affirm the conviction. Vaden v. State, 742 P. 2d 784 (Alaska App. 1987). This appeal was based on several theories, including that of a violation of Due Process arising from outrageous government conduct. Mr.

Vaden's position was that the state's sponsorship of and participation in the illegal acts was so pervasive and outrageous that Due Process required dismissal. Further, it was argued that the government's acts constituted an abuse of power and that Due Process required dismissal. Also, it was argued that, where the State committed criminal acts for the purpose of implicating Mr. Vaden as an aider and abettor, the State acted outrageously, requiring dismissal under the Due Process Clause of the United States Constitution.

Each of the three appellate court judges wrote a separate opinion. Judge Coats, in relevant part, noted that convicting Mr. Vaden as an accessory when the principal was a government undercover agent was a cause for concern but that the defense of entrapment was an adequate

remedy. Judge Singleton stated the court should not foreclose the possibility of a Due Process defense based upon unconscionable police conduct, even absent entrapment; but, he found that Mr. Snell's willingness to shoot foxes was not the kind of outrageous police conduct which warrants dismissal. In dissent, Judge Bryner wrote that he would reverse Mr. Vaden's conviction because Agent Snell's conduct did not satisfy acceptable standards for the fair administration of justice.

Mr. Vaden then appealed to the Alaska Supreme Court. Again, Mr. Vaden asserted numerous theories, several of which focused on his rights under the Due Process clause of the Fourteenth Amendment of the United States Constitution. He argued that the State's acts constituted an abuse of power and outrageous conduct requiring dismissal as violative of Due Process. He asserted

that the State permitted itself to become enmeshed in criminal activity throughout the operation. He also argued that the State's agent committed numerous misdemeanors, from falsifying public documents to shooting the foxes, and that Due Process bars the State from using judicial process where the State's agent commits violations intending to involve a target defendant in the agent's crime. In that regard, it was also argued that a citizen shouldn't be held criminally responsible for the acts of an undercover operative, which operative gathers no evidence of crime other than by his own creation.

In an opinion dated February 10, 1989, the Alaska Supreme Court affirmed the conviction. Vaden v. Alaska; Saltz v. Alaska, _____ P. 2d _____ (No. 3411 1989). Justice Compton, in an opinion

joined by Justice Rabinowitz and Justice Matthews, stated that Due Process is a defense separate and distinct from entrapment but that said Due Process defense was not available to Mr. Vaden because the government's conduct was not outrageous enough to bar prosecution.

In a dissenting opinion, Justice Burke, joined by Justice Moore, argued that the degree of police involvement was such as requires dismissal.

No request for a rehearing was filed by Mr. Vaden and the matter has now reached this court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A Writ of Certiorari should be issued because, in this case, the Alaska Supreme Court decided several important federal questions concerning Due Process, which questions have not been, but should be,

settled by, the United States Supreme Court. Specifically, the Alaska Supreme Court decided as follows:

FIRST, it held that Agent Snell's violation of the law by falsifying official records and illegally shooting four foxes did not constitute conduct outrageous enough to bar prosecution.

SECOND, the Alaska Supreme Court adopted the standard articulated in United States v. Williams, 791 F. 2d 1383 (9th Cir. 1986), cert. denied, Sears v. United States, _____ U.S. _____, 93 L. Ed. 2d 159 (1986). Williams held that, in general, the government must have engineered and directed the criminal enterprise from start to finish before its conduct would be outrageous enough to justify dismissal. Also, the Alaska Court noted with approval the Williams Court's statement that outrageous conduct would be found when the

government's involvement was malum in se. The Alaska Court then went on to note that Mr. Snell's transgressions were merely malum prohibitum.

THIRD, as noted by Justice Burke in his dissenting opinion, the effect of the Court's opinion is to permit, as consistent with Due Process, an officer of the law to commit crimes as a principal for the purpose of prosecuting another as an accomplice. Justice Burke also noted that the Court cited no cases in which officers "... have been allowed to break the law in order to imbue some object with contraband status, so that it may later be used to support a charge of illegal possession or transportation."

It respectfully is suggested that the Supreme Court has not ruled on the above discussed questions. The two most apposite cases decided by the Supreme Court will be

discussed in order.

In United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), a government undercover agent, who was assigned the task of locating a methamphetamine laboratory, supplied defendant with phenyl-2-propanone, an essential chemical for the manufacture of methamphetamine. This ingredient was difficult to obtain, but legal. In evaluating his Due Process argument, the Court stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction ... The instant case is distinctly not of that breed ... The law enforcement conduct here stops far short of violating that 'Fundamental Fairness, shocking to the universal sense of justice ...' 411 U.S. at 431-432.

In Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113

(1976), the Defendant was convicted of distributing heroin, notwithstanding his claim that the heroin had been supplied to him by a government agent and later sold by him to another undercover government agent. He asserted that the government's conduct was so outrageous as to constitute a violation of Due Process, thus requiring dismissal.

The Supreme Court, in a plurality opinion, affirmed his conviction. Justice Rehnquist, in an opinion joined by Justice White and Chief Justice Burger, stated: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police ..." 425 U.S., at 490.

In the concurring opinion, Justice Powell, joined by Justice Blackmun, agreed

that the supplying of contraband to a defendant by the police was not a per se violation of Due Process. However, Justice Powell was not willing to go further and " ... join the plurality in concluding that, no matter what the circumstances, neither Due Process principles nor our supervisory power could support a bar to conviction in any case where the government is able to prove predisposition." 425 U.S., at 495. In a dissenting opinion, Justice Brennan, joined by Justice Stewart and Justice Marshall, wrote, in relevant part, that Russell, supra, does not foreclose a bar on prosecution based on Due Process grounds when police conduct is sufficiently offensive. He further stated that, even when a defendant is predisposed, the government passes the point of toleration when it deliberately sets up the defendant " ... by supplying him with contraband and

then bringing him to another agent as a potential purchaser ... " 425 U.S. at 498.

Hence, The Supreme Court in Russell, supra, held that, on the facts presented, the defense of outrageous government conduct was inapplicable; but, the Court explicitly left open the possibility of asserting such a defense. In Hampton, supra., Justice Rehnquist's plurality opinion forecloses the possibility of asserting such a defense, at least where the defendant was predisposed. Two of the justices, however, in an opinion authored by Justice Powell, refused to foreclose reliance on the defense. Three dissenting justices focused primarily on entrapment and would have found entrapment based on police conduct. Furthermore, the dissent expressed agreement with Justice Powell's position that Russell, supra., does not foreclose a due process defense based on

offensive police conduct.

It respectfully is suggested that the Supreme Court has not had occasion to rule on a case where the state's agent is the principal lawbreaker, as is the case at bar. In Russell, supra., the state's agent supplied a legal, albeit necessary and scarce, chemical. In Hampton, supra., the State allegedly supplied heroin and subsequently purchased it from the defendant. In both Russell, supra., or Hampton, supra., the defendants were convicted of crimes which were logically and legally nondependent on the government's acts. The Government simply made it easier for them to break the law. Here, however, the defendant stands convicted of eight aiding and abetting crimes, each of which logically and legally requires a prior government crime. Mr. Vaden also stands convicted of transporting

three foxes illegally killed by the government. Had the government not killed the foxes illegally, Mr. Vaden could not have been convicted of these three crimes. Thus, all eleven convictions rest upon a foundation of illegal governmental conduct. That being the case, Agent Snell is the principal lawbreaker.

It respectfully is suggested that the United States Supreme Court has never ruled on the Due Process implications of convicting a citizen of aiding and abetting type crimes, which crimes were committed by the government, as principal, for the very purpose of implicating the citizen.

It further is suggested that the Supreme Court has not had occasion to establish predictable standards for evaluating the outrageousness of government conduct with respect to due process. In that regard, it has not had occasion to

rule on the standards articulated in Williams, supra., as applied by the Alaska Supreme Court in this case.

Finally, it is submitted that the United States Supreme Court has not been presented with a case where government misconduct was as pervasive as existed in this case.

The questions presented by this case are of extreme importance and are likely to become even more important in the immediate future. Currently, the United States confronts a very serious problem with illegal drug usage. The problem is viewed as so serious that extensive efforts are being made to apprehend and convict those who traffic in such substances, and, to a lesser extent, the users. Governmental efforts in that regard will utilize undercover agents. Hence, it is crucial to

know what the constitutional right of due process requires of such agents.

Another ground for granting the requested writ is that Alaska decided an important federal question in a way in conflict with another state appellate court. Specifically, Alaska's decision has the effect of holding that individuals, consistent with Due Process, may be convicted of aiding and abetting crimes committed by state agents, as principals, for the very purpose of implicating and convicting said individuals. This issue was examined by the Missouri Appellate Court in State v. Hohensee, 650 S.W. 2d 268 (Mo. App. 1982). There, two paid government informers and one government agent joined with defendant to commit a burglary. The actual burglary was performed by the agent and informers, while the defendant acted as a lookout. The

State's purpose was to secure the conviction of defendant on a theory of accomplice liability. On appeal, the defendant's conviction was reversed. The court stated:

> " ... the government action in sponsoring the acts of Bressie Yarberry and Roberts, with respect to the Bradhorst break-in, was outrageous and ... due process bars the State from invoking judicial process to obtain the conviction of defendant ... "
>
> 650 S.W. 2d, at 274.

It is respectfully submitted that the conflicting approaches taken by the Alaska and Missouri courts is significant and could very well indicate a growing divergence between State courts on this issue. Accordingly, a resolution of this issue by the United States Supreme Court is necessary to insure consistency and uniformity concerning this important Federal issue.

Another reason for granting the requested writ is that Alaska has decided

an important Federal question in a way in conflict with a Federal Court of Appeals.

In United States v. Lard, 734 F. 2d 1290 (8th Cir. 1984), government agents went to defendant's house to purchase a firearm. The defendant refused to sell the weapon in question but proposed that the agents purchase a detonator, which was refused by the agents. Someone suggested that defendant build a pipe bomb, and one of the agents implored him to so do. The defendant agreed, and after the task was accomplished, he was charged with and convicted of transferring an unregistered firearm (the bomb). On appeal, the Court held that the defendant had been entrapped. The Court also noted that the over-involvement of the agents in conceiving and contriving the crimes approached being outrageous enough to bar conviction under the Due Process clause.

In United States v. Twigg, 588 F. 2d 373 (3rd Cir. 1978), a government agent suggested to defendant the establishment of a speed lab. He supplied 20% of the glassware and indispensable ingredients. He provided a farmhouse and purchased most of the materials and supplies. He also provided the required technical knowledge. On appeal, the Ninth Circuit found that the government's involvement was so pervasive as to bar conviction as violative of Due Process.

In Green v. United States, 454 F. 2d 783 (9th Cir. 1971), a government agent over a period of approximately 2 1/2 years, treated defendants as partners in the illegal distillation of alcohol. The agent offered to provide the still, the still site, and an operator. The agent provided sugar at wholesale cost and urged defendants to produce alcohol. He also was

their sole customer. On appeal, the Ninth Circuit dismissed on Due Process grounds. It stated:

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators."
>
> " ... When the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."

It respectfully is suggested that the State's involvement in criminal acts in the instant case was even more pervasive and outrageous than was found in Green, supra., Twigg, supra., and Lard, supra. Here, the State didn't simply provide encouragement, supplies, and assistance. In this case, the State's offenses were logically and legally necessary to Mr. Vaden's offenses. Mr. Snell violated numerous laws for the

very purpose of implicating Mr. Vaden as an aider and abettor and to imbue the carcasses with contraband status, to support the transportation charges. That being the case, the result obtained in this case is inconsistent with the decisions in Twigg, Lard, and Green.

Furthermore, the Alaska Supreme Court's application of the distinction between malum in se and malum prohibitum was rejected by the Ninth Circuit in United States v. Stenberg, 803 F. 2d 422 (9th Cir. 1986). In Stenberg, government agents illegally killed game. The defendants were convicted of numerous crimes unrelated to the agent's hunts. The Court refused to apply the outrageous government conduct defense because of evidence of a continuing series of other crimes by the defendants. However, the Court noted as follows:

> "But for the evidence of that additional unlawful activity we might well have reached a different

> result. The killing of wildlife, on more than one occasion, by a FWS agent, raises significant questions as to the extent to which government agents may commit serious crimes in order to prevent others from committing similar offenses. Here, the government agent was not a passive participant or simply a purchaser or transmitter of contraband otherwise destined for the market place. To the contrary he himself was the perpetrator of the most serious offenses involved ... " 803 F. 2d at 430-431.

The courts are confronted with the extremely difficult task of defining the contours, under Due Process, of permissible governmental behavior in investigating crime. Essentially, it would appear that a balance must be struck. On one side of the balance, as argued so eloquently by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928), governments should not break the law. On the other side of the balance is the need to apprehend lawbreakers. At some

point, there is a limit to allowing governmental involvement in crime. United States v. Archer, 486 F. 2d 670 (2nd Cir. 1973). It is vitally important for the Supreme Court to define that point.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Following is Included in Appendix A:

(1) Copy of Alaska Supreme Court's opinion in: Douglas B. Vaden v. State of Alaska and Floyd Saltz,Jr. v. State of Alaska, which has not yet been published. (pp. a-2 through a-51).

(2) Copy of opinion by the Court of Appeals of the State of Alaska in Douglas B. Vaden v. State of Alaska, 742 P. 2d 784 (Alaska App. 1987). (pp. a-52 through a-76).

(3) Copy of the Trial Court Judgment (pp. a-77 through a-82). Note that counts 5 and 9 pertain to a different case and are not pertinent to the case at bar.

THE SUPREME COURT FOR THE STATE OF ALASKA

DOUGLAS B. VADEN, Petitioner, v. STATE OF ALASKA, Respondent.	)	File No. S-2443 OPINION
FLOYD SALTZ, JR., Petitioner, v. STATE OF ALASKA, Respondent.	)	File No. S-2500 [No. 3411 - February 10, 1989]

Petition for Hearing in File No. S-2443 from the Court of Appeals of the State of Alaska, on appeal from the District Court, Third Judicial District, Glennallen,

John Bosshard III, Judge

Petition for Hearing in File No. S-2500 from the Court of Appeals of the State of Alaska, on appeal from the District Court, Third Judicial District, Anchorage, David Stewart, Judge

Appearances: Daniel W. Allan, Anchorage, for Petitioner Douglas B. Vaden, Walter Share, Anchorage, for Petitioner Floyd Saltz, Jr., Robert D. Bacon, Assistant Attorney General, Anchorage, Grace Berg Schaible, Attorney General, Juneau, for Respondent.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

COMPTON, Justice.

BURKE and MOORE, Justices, dissenting.

This petition arises out of convictions of two hunting guides, Douglas B. Vaden and Floyd Saltz, Jr., following undercover operations by the State of Alaska. The primary issue we address is whether allegedly illegal conduct by the undercover agents warrants reversal of the convictions. The court of appeals, in a plurality decision with one judge dissenting, affirmed Vaden's conviction. Vaden v. State, 742 P. 2d 784 (Alaska App. 1987). It also affirmed Saltz's conviction. Saltz v. State, MO&J No. 1510 (Alaska App. 1987). We granted hearing pursuant to Appellate Rule 304.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. VADEN

In November 1983, a horse wrangler employed by Douglas B. Vaden during the

fall of 1983 hunting season informed Fish and Wildlife Protection officers of illegal hunting methods allegedly used by Vaden while guiding a foreign hunter. In the spring of 1984, John Snell, an undercover agent for the Alaska Department of Fish and Game[1] posing as a hunter, contracted for guiding services from Vaden. Snell was instructed on how to conduct himself on the hunt.[2]

---

1. Snell was "on loan" from the Wyoming Attorney General's Office, and had apparently carried out similar fish and game "sting" operations for the State of Wyoming.

2. INSTRUCTIONS TO HUNTERS:

1. During your scheduled guide hunt you are considered an agent of the State, this however, does not permit you to take game contrary to State statutes and regulations.

(Footnote continued)

During the hunt Snell shot and killed four foxes from Vaden's aircraft. The season on foxes was closed at that time. Vaden provided Snell with the shotgun used to shoot the foxes, and maneuvered the aircraft so Snell could shoot the foxes. The fox carcasses were then transported to Anchorage by Vaden.

(Footnote Continued)

2. Your assignment during all phases of your guided hunt is to observe, record and determine the method of operation used by the guide in providing his guide service to a client.

3. You are to follow all instructions provided to you by your guide.

4. You are not to take any game without first being instructed to do so by your guide.

5. Do not at any time or under any circumstances induce a guide to commit any crime.

6. All game taken on your hunt is the property of the State.

Vaden was convicted, as an accomplice,[3] on four counts of taking foxes from an aircraft (5 AAC 81.072(4) now 5 AAC 92.080(5)) and four counts of taking foxes during closed season (5 AAC 81.330(4) now 5 AAC 88.160(2)).[4] He was also convicted in his own right on three counts of possession and transportation of illegally taken game (5 AAC 81.140(c) now 5 AAC 92.140(c)). He was acquitted on several other counts, including solicitation of the agent's takings.

---

3. AS 11.16.110 provides:

> A person is legally accountable for the conduct of another constituting an offense if
>
> . . . .
>
> (2) with intent to promote or facilitate the commission of the offense, the person
>
> . . . .

(Footnote continued)

Vaden appealed his convictions, contending that no illegal acts were committed by Snell and thus no criminal liability could attach to Vaden for "aiding and abetting" or transportation of illegally taken game, and alternatively, if crimes had been committed by Snell, such law enforcement tactics amounted to entrapment as a

---

((Footnote Continued)

> (B) aids or abets the other in planning or committing the offense; or (3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct.

4. Vaden was also charged with additional offenses under the "guide aiding" statute, AS 08.54.210. These charges were later dismissed as a result of Vaden's motion to dismiss "duplicitous/multiplicitous" counts.

matter of law and violated due process.[5] Vaden v. State, at 785-86. the court of appeals upheld Vaden's convictions. Id.

The court of appeals concluded that Snell had "committed the offense" of taking foxes from the air out of season, but that Snell had a personal defense of justification, which Vaden would not be able to avail himself of under AS 11.16.120.[6] 742 P. 2d at 786. The court

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5. Vaden preserved these defenses by a timely pretrial motion to dismiss, which was denied.

6. AS 11.16.120 provides in part:

> (a) In a prosection for an offense in which legal accountability is based on the conduct of another person;
>
> . . . .
>
> (2) it is not a defense that

(Footnote Continued)

further concluded that "convicting Vaden as an accessory, when the principal was an agent for the government, is a cause for concern." However, "any government overreaching is adequately covered by the defense of entrapment," which relieves a defendant of liability where police conduct has induced a defendant to commit an offense by such persuasion or inducement as would be effective to

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(Footnote Continued)

(A) the other person has not been prosecuted for or convicted of an offense based upon the conduct in question or has been convicted of a different offense or degree of offense;

(B) the offense, as defined, can be committed only by a particular class of persons to which the defendant does not belong, and the defendant is for that reason legally incapable of committing the offense in an individual capacity;

or

(C) the other person is not guilty of the offense.

persuade an average person to commit the offense. Id. at 787; see also AS 11.81.450. The court concluded that since Vaden had failed to show such inducement, his convictions should be affirmed. Id.

Judge Singleton, in a concurring opinion, agreed that Snell's actions were without proper legal authorization and were, therefore, illegal. 742 P. 2d at 788.[7] He took exception, however, to the court's suggestion that the entrapment defense alone was adequate to protect against government overreaching. Judge Singleton concluded that unconscionable police conduct not involving inducement might, by itself, justify the dismissal

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7. He expressed "grave reservations," however, as to whether Snell's acts would fall within the "justification" exception to criminal liability. 742 P. 2d at 788.

of a charge, but only where the police conduct "shock[ed] the universal sense of justice and violat[ed] the concept of fundamental fairness." Id. at 789 (quoting Anchorage v. Flanagan, 649 P. 2d 957, 963 (Alaska App. 1982)). He concluded that no such shocking police conduct was presented and that the convictions should be affirmed. Id.

Chief Judge Bryner dissented, observing that "[t]he state's effort to ferret out crime consisted of Snell's shooting foxes as a means of convicting Vaden vicariously for the shooting of those very same foxes." Id. at 789. Such conduct, Judge Bryner asserted, "[falls] below an acceptable standard for the fair and honorable administration of justice" and thus justified dismissal of the charges against Vaden. Id. (quoting Pascu v. State, 577 P. 2d 1064, 1067 (Alaska 1978)).

We granted Vaden's petition for hearing.

B. SALTZ

In October 1984, undercover agent Thomas Pagel,[8] posing as a client, accompanied licensed assistant guide Floyd Saltz into the bush.

Initially Pagel had contracted for a fishing trip. Pagel apparently expressed a desire to hunt on the trip also and questioned Saltz about hunting. Pagel testified that Saltz responded by saying "you could not kill a caribou the same day you were airborne but that once you got in the bush you did basically what the hell you wanted to."

On October 6 the pair flew out of Talarik Creek. Pagel testified that Saltz told him the area was limited to

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8. Pagel was apparently on contract from the State of Wyoming.

flyfishing only and gave him a fly rod. A short time later Saltz decided the fishing was slow and gave Pagel a baited spinning rod. The pair then caught about thirty trout on spinning gear.

Pagel also testified that after the trout stopped biting the pair began catching Northern Pike. According to Pagel, Saltz caught 20 to 30 pike, killed them and threw them into the lake.

On October 7 Saltz flew Pagel into an area with little air traffic for a caribou hunt. Saltz handed Pagel a rifle and pointed out which bull caribou to shoot. Pagel shot and killed the bull. Saltz also pointed out a cow caribou for Pagel to shoot. However, Pagel gave Saltz the rifle and Saltz shot the cow. They did not salvage the meat from the cow. Saltz allegedly shot at another bull, but it is not clear whether it was killed.

After the two took pictures of the bull Pagel shot, they started to skin it. While working on the hindquarters, Saltz told Pagel the meat was not worth salvaging because the caribou "smelled as if it was in rut." Pagel indicated he wanted the antlers and Saltz salvaged them. The pair left the meat.

Saltz testified to a different version of facts. He claimed Pagel initiated the fishing violations. He also claimed Pagel was left alone and shot the caribou while Saltz was not present, and that it was Pagel's idea to leave the meat behind.

The offenses with which Saltz was charged grew out of three basic incidents: (1) Pagel's killing and wasting of a bull caribou the same day he was airborne, (2) Saltz's killing and wasting of a cow caribou the same day he

was airborne, and (3) both parties' use of illegal fishing gear and waste of fish.

Saltz's pretrial motions to dismiss were denied by the trial court. At trial, the jury believed Pagel's version and convicted Saltz on all 16 counts alleged against him, including soliciting the violations.[9]

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9. Specifically, the counts were:

Count I:	Soliciting taking bull caribou same-day airborne
Count II:	Solciting taking cow caribou same-day airborne
Count III:	Soliciting waste of bull caribou
Count IV:	Aid taking bull caribou same-day airborne
Count V:	Taking cow caribou same-day airborne
Count VI:	Attempt take bull caribou same-day airborne
Count VII:	Aid waste bull caribou
Count VIII:	Wasting cow caribou
Count IX:	Guide aiding taking bull caribou same-day airborne
Count X:	Guide aiding waste of bull caribou
Count XI:	Transportation of illegally-taken game

(Footnote Continued)

Saltz appealed, arguing inter alia that his convictions must be reversed because of Pagel's illegal acts. The court, citing its earlier decision in Vaden v. State, rejected Saltz's argument. The court did conclude, however, that there were "three groups of three counts in which the same conduct forms the basis for all three counts: one based on aiding by a guide, another based on aiding and abetting and the other based on solicitation." The court concluded that conviction on all three counts violated double jeopardy principles, and thus ordered the trial

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(Footnote Continued)

Count XII: Solicit fishing with illegal gear
Count XIII: Using illegal fishing gear
Count XIV: Aid use of illegal fishing gear
Count XV: Waste of fish
Count XVI: Guide aiding illegal fishing.

court to vacate two of the three counts in each group. Chief Judge Bryner, separately concurring, would have also stricken those convictions "predicated on Pagel's illegal acts;" however, he concurred in the result since each of the convictions had been accompanied by "parallel convictions for solicitation based on Saltz's own conduct."

We granted Saltz's petition for hearing, but limited our review to those issues already before us in Vaden.

II. DISCUSSION

A. LEGALITY OF THE UNDERCOVER AGENT'S ACTIVITIES.

Initally Vaden challenged his "aiding and abetting" and transportation convictions on the grounds that the undercover agent's actions were legal. Saltz challenged his guide "aiding and abetting" and transportation convictions

on the same grounds. They argue that for these convictions to be sustained, someone must have committed an illegal act. See United States v. Sanford, 547 F. 2d 1085 (9th Cir. 1976). (To sustain convictions under Lacey Act interstate transportation of illegally killed game, undercover agent's actions must be illegal). We agree with the court of appeals that the agents committed the offenses. See 742 P. 2d at 786. However, it is irrelevant whether the agents' acts were authorized. As explained below, if the agents had a justification defense it was personal to them.

B. APPLICABILITY OF JUSTIFICATION DEFENSES TO ACCOMPLICES' LIABILITY.

Both Vaden and Saltz argue that they could avail themselves of the public

authority justification defense available to Snell and Pagel. It is not necessary to decide whether an undercover agent in these circumstances may utilize a public authority justification defense. See AS 11.81.420.[10] As the court of appeals

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10. The public authority justification defense is codified as AS 11.81.420 which reads:

> (a) Unless inconsistent with AS 11.81.320 - 11.81.410, conduct which would otherwise constitute an offense is justified when it is required or authorized by law or by a judicial decree, judgment, or order.
>
> (b) The justification afforded by this section also applies when
>
> (1) The person reasonably believes the conduct to be required or authorized by a decree, judgment, or order of a court of competent jurisdiction or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; or

(Footnote Continued)

concluded, a justification defense is personal to the undercover agent and not transferable to the accomplice. 742 P. 2d at 786. It is clear from our statutory scheme that a principal does not need to be found guilty or even prosecuted in order to convict the accomplice.[11] Further, it has been said that "it is the abettor's state of mind rather than the state of mind of the perpetrator which determines the abettor's guilt or innocence."

(Footnote Continued)

> (2) The person reasonably believes the conduct to be required or authorized to assist a peace officer in the performance of the officer's duties, notwithstanding that the officer exceeded the officer's authority.

As noted by Judge Singleton, this defense may or may not be available to an undercover agent in the position of Snell or Pagel. 742 P. 2d at 788.

11. See supra note 6.

R. Perkins & R. Boyce, Criminal Law 743 (3d ed. 1982) (hereinafter Criminal Law). Because the accomplice's state of mind is the focus, defenses of entrapment, duress and heat of passion are not imputed to the accomplice. United States v. Azadian, 436 F. 2d 81 (9th Cir. 1971) (entrapment); State v. Harvey, 736 P. 2d 191, 193 (Or. 1987) (per curiam) (duress); Parker v. Commonwealth, 201 S.W. 475, 478 (Ky. 1918) (heat of passion).

The entrapment defense has been likened to an immunity from prosecution based on government conduct. Azadian at 82-83 (quoting Carbajal-Portillo v. United States, 396 F. 2d 944, 948 (9th Cir. 1968)). The public authority justification defense operates to immunize the public official from criminal liability for acts within the

scope of the officials' authority. See, Criminal Law, supra. at 1093. Because entrapment and the public authority justification defense are similar in this regard, even if the public authority defense were available to the undercover agents, neither Vaden or Saltz could avail himself of the agent's defense.

C. THE ACTIONS OF SNELL AND PAGEL DO NOT CONSTITUTE ENTRAPMENT.

Vaden raised the defense of entrapment before the trial court. The trial judge rejected the defense after a pretrial hearing. The court of appeals upheld the trial judge's determination. 742 P. 2d at 787. Vaden did not pursue the entrapment issue in this court.

Saltz also raised an entrapment defense in the trial court. The trial judge similarly rejected the defense.

Saltz appealed the issue to the court of appeals, which upheld the trial court. Saltz v State, supra. Saltz continues to pursue this issue.

The availability of the entrapment defense in a particular case is a question for the trial court. Folsom v. State, 734 P. 2d 1015, 1017 (Alaska App. 1987). The defendant must show, by a preponderance of the evidence, that the police employed tactics of "persuasion or inducement such as would be effective to persuade the average person . . . to commit the offense." AS 11.81.450, Id.. Here there is no indication in the record that Pagel employed such tactics.[12] On the basis of the record, the trial judge could reasonably conclude that Saltz

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12. Indeed, at trial Saltz was convicted of soliciting the offenses committed by Pagel. See supra note 9.

failed to establish entrapment by a preponderance of the evidence. 734 P. 2d at 1017. Therefore, we affirm the court of appeals on this issue.

D. THE CONDUCT OF THE UNDERCOVER AGENTS DID NOT VIOLATE DUE PROCESS.

Both Vaden and Saltz challenge their convictions on due process grounds. They rely on dictum of the United States Supreme Court in United States v. Russell, 411 U.S. 423, 36 L. Ed. 2d 366 (1973). In Russell, the Supreme Court indicated that at some point government involvement in detecting criminal activity could rise to a level of outrageousness "shocking to the universal sense of justice." 411 U.S. at 432, 36 L. Ed. 2d at 373 (quoting Kinsella v. United States ex rel Singleton, 361 U.S. 234, 246, 41 L. Ed. 2d 268, 276 (1960)).

Under this approach, illegal conduct of the government is not a per se bar to prosecution; the test is whether the government's conduct is outrageous enough to warrant dismissal of the charges. See Hampton v. United States, 425 U.S. 484, 491, 48 L. Ed. 2d 113, 119 (1976) (Powell, J., concurring).

The court of appeals divided over whether the due process defense was incorporated into our entrapment defense. Compare 742 P. 2d at 786, 787 with 742 P. 2d at 789 (Singleton, J., concurring). Generally, police conduct that is outrageous or below the level of "an acceptable standard for the fair and honorable administration of justice" will be encompassed by the entrapment defense. Pascu, 577 P. 2d at 1067. There may be other times when police conduct is so unacceptable that it rises to a

"demonstrable level of outrageousness" that warrants dismissal. Hampton, 425 U.S. at 496, n. 7, 48 L. Ed. 2d 113, 122 n. 7 (Powell, J., concurring).

Both Vaden and Saltz cite numerous cases in which federal and state courts found government conduct to be outrageous enough to bar prosecution. The majority of these cases involve government conduct in drug sales or manufacture. They support the proposition that at some point government conduct can be outrageous enough to warrant a dismissal. See, e.g., United States v. Twigg, 588 F. 2d 373 (3rd Cir. 1978); State v. Hohensee, 650 S.W. 2d 268 (Mo. 1982).

Hohensee presents a more egregious set of facts than the instant case. Hohensee was convicted as an accomplice to a burglary. 650 S.W. 2d. at 269. The actual burglary was carried out by two

paid informants and a police officer. Hohensee merely acted as a lookout. Id. at 268-269. In reversing Hohensee's conviction, the court held that sponsoring the break-in was outrageous conduct on the part of the government and barred prosecution. Id. at 274. The court observed that Hohensee's only conduct was standing watch as lookout one-half block from the building burglarized. Id.

In the instant case, we conclude that the government's conduct is not outrageous enough to bar prosecution. However, we reject the implication in the opinion of the court of appeals that outrageous government conduct is subsumed within the entrapment defense. It alone may justify judicial intervention.

In searching for a standard by which government conduct, or misconduct,

is to be measured, we find persuasive the reasoning of the Ninth Circuit Court of Appeals in United States v. Williams, 791 F. 2d 1383 (9th Cir. 1986) cert. denied, Sears v. United States, _____ U.S. _____, 93 L. Ed. 2d 159 (1986). There the court suggested that in general, to be outrageous enough to bar prosecution "the government must have 'engineered and directed the criminal enterprise from start to finish.'"[13] Id. at 1386.

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13. The court also said that outrageous conduct barring prosecution would be found when the government's involvement was "malum in se" Williams at 1386.

In the instant case, the government involvement was not "malum in se". "Malum in se" is defined as follows:

> A wrong in itself; an act or case involving illegality from the very nature of the

(Footnote Continued)

In neither Vaden's nor Saltz's case did the government "engineer and direct the criminal enterprise from start to finish." Williams at 1386.

(Footnote Continued)

> transaction, upon principles of natural, moral, and public law. An act is said to be malum in se when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

Black's Law Dictionary 865 (5th ed. 1979) (citations omitted). Acts merely prohibited and not rising to the level of malum in se are malum prohibitum, which is defined as follows:

> A wrong prohibited; a thing which is wrong because

(Footnote Continued)

In Vaden's case, the state had information that Vaden had used illegal hunting practices the previous fall.[14] Vaden was in control of the aircraft when Snell shot the foxes. Vaden maneuvered the aircraft to provide Snell with a platform from which to shoot. Vaden also provided the shotgun used to shoot the foxes. This was not a government engineered crime from start to finish. Id. Nor was Vaden merely standing watch while the government agents perpetuated the crime as in Hohensee. Instead, Vaden was an active participant.

(Footnote Continued)

> prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality

(Footnote Continued)

In Saltz's case, the jury found that he "engineered" the crimes. His convictions demonstrate that the jury believed he provided the rifle and pointed out the bull caribou Pagel should shoot. The jury also believed that he indicated the meat was bad and suggested that they salvage only the antlers. The government did not engineer Saltz's criminal conduct from start to finish,

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(Footnote Continued)

> resulting from positive law. Contrasted with malum in se.

Id.

Because fish and game violations are not inherently evil or immoral and are proscribed only by statute, they are malum prohibitum and not malum in se.

14. Vaden was targeted for investigation based on information supplied by an employee who allegedly had observed illegal hunting practices during fall hunts in 1983.

either. The jury implicitly found he was a willing instigator of the crimes.[15]

We are not persuaded by Vaden and Saltz' argument that the charges in this case be dismissed solely because the government agents engaged in illegal hunting and fishing activity. In the plurality opinion in Hampton, the Supreme Court suggested that the correct remedy when police go outside the scope of their duties is to "prosecute the police," not "free the equally culpable defendant." Hampton, 425 U.S. at 490, 48 L. Ed. 2d at 119. This remedy has been used in other states to curb offensive conduct. See, e.g., Riegan v. People, 210 P. 2d 991, 120 (Colo. 1949) (prosecution of game wardens for conspiracy for entrapping 18 and 19-year olds to unlawfully trap beaver).

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15. See supra note 9 (solicitation charges).

III. CONCLUSION

For the above reasons we AFFIRM the convictions of Vaden and Saltz.

BURKE, Justice, with whom MOORE, Justice, joins, dissenting.

I respectfully dissent.

The danger to Alaska's resources posed by persons willing to assist others in the violation of state fish and game laws is both obvious and substantial. There must, however, be limits upon the degree of police involvement in criminal activity which will be tolerated. When the police or their agents commit criminal acts in order to charge others as accessories to those same acts, in my view the line is crossed.

The convictions in the cases now before us could not have been obtained had law enforcement officers not broken the law. Accordingly, the situation differs markedly from that found in the "outrageous conduct" cases cited by my colleagues. Here, the state seeks to

obtain convictions because of the illegal conduct of its own agents, rather than in spite of such conduct. The state does not ask this court merely to close its eyes to the officers' illegal acts. On the contrary, it asks that we recognize such acts as an acceptable means of providing an element essential to conviction of these defendants.

Notably, the court cites no case in which an officer of the law has been permitted to commit a crime as principal, for the sole purpose of securing the conviction of another as an accomplice; nor does it cite any case in which the police have been allowed to break the law in order to imbue some object with contraband status, so that it may later be used to support a charge of illegal possession or transportation. There is, however, case law to the contrary.

In State v. Hohensee, 650 S.W. 2d 268 (Mo. App. 1982), state police retained the services of one undercover police officer, Roberts, and two known burglars, Bressie and Yarberry, who were instructed to burglarize a building. The purpose of the plan was to secure the conviction, on a theory of accomplice liability, of a fourth burglar who had agreed to stand lookout for the other three. Id. at 268-70. The court held that the government's involvement in the break-in was outrageous and that due process barred the conviction of the defendant for burglary. Id. at 274. Distinguishing the case from those in which convictions had been sustained notwithstanding some police involvement in the criminal enterprise carried out by the defendants, the court noted:

> In [those cases] the defendant himself participated in the illegal

> entry .... if the conduct of Bressie, Yarberry and Officers Roberts, each acting as a salaried agent of the police department, is subtracted from the ... break-in, what remains of that midnight enterprise is a lone figure, sitting in a parking lot ½ block away. It is true that defendant had criminal intent but his conduct, standing alone, represented no more of a threat to society than that of a stargazer, similarly situated, contemplating Polaris. It is difficult to conceive a situation where the government's involvement could be greater or the defendant's could be less, and the conduct of the latter still be a likely subject to prosecution.
>
> The break-in was accomplished by the government agents, whether or not defendant was in the vicinity. If the government agents had not been there, doing their illegal acts, defendant's conduct would not be illegal.

Id.

The instant case is on all fours with Hohensee. Here, as in that case, the criminal act which serves as the

basis for both the accomplice liability and the illegal transportation charges was supplied by government agents. When such illegal conduct is subtracted from the equation, the conduct of the defendants, however evil the intent which accompanied it, does not amount to a crime. Accordingly, their convictions should be quashed as was the conviction in Hohensee.

The majority apparently assumes that game offenses, being "malum prohibitum" rather than "malum in se," cannot be deemed sufficiently outrageous to trigger due process concerns. This notion, however, was implicitly rejected by the Ninth Circuit Court of Appeals in United States v. Stenberg, 803 F. 2d 422 (9th Cir. 1986).

In Stenberg, United States Fish and Wildlife Service agents carried out two

hunts virtually identical to those involved in the case at bar. The charges based upon these hunts, at least as to the outrageous conduct defense,[1] were not directly at issue on appeal. The Court of Appeals refused to dismiss the defendants' numerous other convictions for independent wildlife crimes on the basis of outrageous conduct.[2] The court reasoned that the defendants' involvement

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1. As to one defendant, the charges relating to the hunt by fish and wildlife agents never reached the Court of Appeals. Stenberg, 803 F. 2d at 426. As to the other defendant, the court dismissed the hunt-related charges on other grounds. Id. at 435-37.

2. The defendants were actually convicted of a number of crimes unrelated to the fish-and-wildlife-sponsored hunts. Most of these involved the sale of hides and antlers of game illegally taken by third parties. Id. at 426-28. In some cases the sales were made to police agents; in others they were made to persons uninvolved with the undercover operations. Id. at 430.

in "a continuing series of similar crimes during the government conduct at issue" precluded them from raising the defense. Id. at 429. The court was careful to note, however:

> But for the evidence of that additional unlawful activity we might well have reached a different result. The killing of wildlife, on more than one occasion, by an FWS agent raises significant questions as to the extent to which government agents may commit serious crimes in order to prevent others from committing similar offenses. Here, the government agent was not a passive participant or simply a purchaser or transmitter of contraband otherwise destined for the market place. To the contrary, he himself was the perpetrator of the most serious offenses involved -- the actual killing of protected wildlife. Under different circumstances such active criminal behavior by a government agent might well result in our upholding a defense of outrageous government conduct.

Id. at 430-31 (footnote omitted).[3]

Again, the reasoning contained in the quoted portion of Stenberg would seem perfectly applicable in the case at bar. Indeed, the conduct by fish and game agents in this case is identical to that described in Stenberg. There has been no showing that the defendants in this case were "involved in a continuing series of similar crimes during the government conduct at issue"; at least none which comes close to the level of criminal activity engaged in by the defendants in Stenberg.[4] Accordingly, dismissal based

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3. The court disavowed as "dictum" its earlier suggestion in United States v. Sanford, 547 F. 2d 1085 (9th Cir. 1976), that fish and game violations by state officials would not amount to "outrageous conduct" for purposes of the defense. Id. at 431.

4. There was absolutely no showing on the record that Vaden was engaged in

(Footnote Continued)

upon the outrageous conduct defense is appropriate.

The accomplice liability charges should fail on another ground as well: the long-standing common law rule that the acts of a feigned accomplice may never be imputed to the targeted defendant for purposes of obtaining a conviction. In State v. Neely, 300 P. 561 (Mont. 1931), the Montana Supreme

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(Footnote Continued)

"similar crimes during the government conduct at issue" here. Saltz' contemporaneous fishing and wildlife violations (e.g., personal commission of fishing and wildlife offenses) arguably qualify as sufficient to trigger the Stenberg rule, and I would agree that Saltz should be precluded from arguing for dismissal of these collateral offenses. As to those offenses based solely upon the agents' illegal conduct, however, i.e., accomplice liability and illegal transportation, I see no reason to preclude the challenge. The Stenberg court did not need to address this issue, see supra note 4. However, I am confident it would have held accordingly.

Court applied this principal under circumstances akin to those in the case at bar. In Neely, a cattle owner employed a detective, Harrington, to "get in" with suspected cattle thieves during an act of cattle rustling. Id. at 562. Harrington associated himself with the criminal enterprise, and the crime was carried out. Id. at 562-63. Harrington himself, however, committed the principal offense of purloining the cattle, while the targeted suspect merely stood watch outside the premises and offered various other forms of assistance before and after commission of the offense. Id. The court reversed Neely's conviction as an accomplice to the crime,[5] reasoning as follows:

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5. Notably, this was not a case in which the court found that the owner's consent to Harrington's taking vitiated the unlawfulness of his acts. Like the

(Footnote Continued)

> [Even] assuming that the original plan emanated from Neely, Harrington ruined the case he was building up when, on his failure to induce Neely to go to Meridian basin and drive out cattle, he himself did so without Neely's assistance.
>
> . . . .
>
> The owner of property, or the state, may employ detectives or decoys to secure evidence against those engaged in or who comtemplate, a violation of the law and, if the intent originates with, and is carried out by, the person so decoyed or caught, and the detective or decoy goes with him only for the purpose of obtaining evidence, or even assists him in the commission of the crime for the purpose of capturing the criminal in the act, a conviction will be upheld but in such a case, in order to hold the alleged offender
>
> . . . .

(Footnote Continued)

majority today, the court in Neely concluded that Harrington had exceeded his rightful authority in taking and butchering the cattle. Id. at 565. Nonetheless, the court concluded that Harrington's acts, as a feigned accomplice, could not be imputed to Neely. Id. at 566.

criminally responsible, it is necessary to show that he participated in every essential act necessary to constitute the crime, whether the plan originated with him and the original intent was his, or the plan originated with the detective and the intent was by that person instilled in his mind.

Here, the principal overt acts constituting the offense were the asportation and butchering of the animal -- acts admittedly committed by Harrington and Pings without the assistance of Neely, except as a picket or watcher. . . . The law applicable to the facts is that, "when officers of the law are informed that a person intends to commit a crime against the property or person of another, the law permits them to afford opportunities for its commission and to lay traps which may result in the detection of the offender. To this end a person may be engaged to act with the one who is suspected and to be present with him at the time the crime is to be committed; and if the accused, having himself originally conceived the criminal intent, commits such of the overt acts as are necessary to complete the offense, he will not be protected from punishment by

> reason of the fact that when the acts were done by him the person who was present with the knowledge and apprcval of the authorities aided and encouraged their perpetration. It is, of course, necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputted to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail."

Id. at 565-66 (quoting People v. Lanzit, 233 P. 816 (Cal. App. 1924))(emphasis added) (citations omitted).

The principle enunciated in Neely, which has been repeated by numerous courts under a variety of factual circumstances, see e.g., People v. Goldberg, 314 P. 2d 151, 157-58 (Cal.

App. 1957); State v. Decker, 14 S.W. 2d 617, 620 (Mo. 1929); State v. O'Donnell, 354 P. 2d 1105, 1107 (Mont. 1960); Shouquette v. State, 219 P. 727, 731 (Okla. App. 1923); State v. Pacheco, 369 P. 2d 494, 495 (Utah 1962), is based in sound reason. It is the general rule that one who aids and abets another in criminal activity is liable for all of the "natural and probable consequences" of his accomplice's criminal acts, see United States v. Barnett, 667 F. 2d 835, 841 (9th Cir. 1982); People v. Durham, 449 P. 2d 198, 201 (Cal. 1969). Thus, the potential for abuse inherent in law enforcement methods such as those employed in the case at bar is substantial. Once an agent has succeeded in persuading an individual to take some substantial act in furtherance of his general criminal scheme, the ultimate

liability of the targeted defendant, if any, will depend upon which foreseeable crimes the agent chooses to commit in order to secure convictions against his criminal "accomplice."

In this case, Officer Snell shot four foxes. Vaden, as pilot of the plane from which they were shot, was charged with four separate criminal counts of taking foxes from the air out of season.[6] Had Snell opted to shoot a fifth fox, one more count could have been added to

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6. "Aiding and abetting, is, of course, not a separate offense. It is well established that aiding and abetting "does not constitute a discrete criminal offense but only serves as a more particularized way of identifying the 'persons involved' in the commission of the substantive offense." United States v. Oates, 560 F. 2d 45, 54 (2d Cir. 1977); see also United States v. Campbell, 426 F. 2d 547, 553 (2d Cir. 1970). Under AS 11.16.110 a criminal defendant is held "legally accountable for the conduct of another." Thus, it is the illegal takings by the undercover officers which are directly imputed to the defendants here.

Vaden's indictment. In my view, it is clearly inconsistent with due process principles, and manifestly unjust, that the ultimate criminal liability of a defendant should be made to depend upon the good aim and/or the good intentions of the police officer charged with securing his arrest.

I would uphold those of Saltz' convictions which were based upon his independent criminal acts. However, I would reverse those convictions, for both Saltz and Vaden, which could not have been established but for the illegal acts of the government agents in this case, i.e., the accomplice liability and transportation of illegally taken game charges. In my view, these convictions fall squarely within the paramenters of the due process/outrageous conduct

defense as discussed and applied in Hohensee and Stenberg.

Alternatively, even if the police conduct could not be deemed sufficiently "outrageous" to satisfy the requirements of the due process defense, I would hold that the convictions for accomplice liability must fail under the commons law rule prohibiting imputation of the acts of a feigned accomplice to a targeted criminal defendant.

I certify that this is a true, full copy of an original document on file in the Appellate Courts of the State of Alaska.
Dated March 30, 1989 at Anchorage, Alaska.
CLERK OF THE APPELLATE COURTS

BY: /s/
CAROL L. VANCE
Duputy Clerk

THE COURT OF APPEALS OF THE STATE OF ALASKA

DOUGLAS B. VADEN, Appellant,	)	File No. A-1581
vs.	)	OPINION
STATE OF ALASKA, Appellee.	)	[No. 743 - September 15, 1987]

Appeal from the District Court of the State of Alaska, Third Judicial District, Glennallen, John Bosshard, III, Judge.

Appearances: Daniel W. Allan, Anchorage, for Appellant. Eugene B. Cyrus, Assistant District Attorney, Dwayne W. McConnell, District Attorney, Palmer, and Ronald W. Lorensen, Acting Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge,

Coats and Singleton, Judges.

COATS, Judge.

SINGLETON, Judge, Concurring.

BRYNER, Chief Judge, Dissenting.

FACTS

Douglas B. Vaden, a professional hunting guide, was convicted in a jury trial of eleven hunting violations involving the illegal taking and subsequent transportation of game. A client of Vaden's, John Snell, was an undercover agent for the State Division of Fish and Wildlife Protection. Snell shot four foxes out-of-season from Vaden's airplane. Three of the foxes were transported back to the guide camp

and ultimately on to Anchorage.[1]

Vaden essentially raises three issues on appeal. First, he claims the defense of legal impossibility to the aiding and abetting convictions. If there is no "crime" committed by the principal, he argues, there can be no accomplice liability. This argument relates to the four counts of aiding and abetting taking four foxes airborne in violation of former 5 Alaska Administrative Code (AAC) 81.072(4), and four additional counts of taking the same four foxes out-of-season in violation of

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1. Vaden was convicted of violations of former 5 Alaska Administrative Code (AAC) 81.072(4), taking game from a mechanical vehicle; former 5 AAC 81.140(c), knowingly transporting game taken in violation of Title 16 or regulations promulgated under Title 16; former 5 AAC 81.330(4), hunting fox during a closed season.

former 5 AAC 81.330(4). Next, Vaden claims that he did not transport illegally-taken game because the foxes were not taken illegally. This argument relates to three counts of unlawfully possessing and transporting three of the illegally-taken foxes. Finally, Vaden asserts that the government's conduct in this case was so outrageous that due process requires dismissal of the case. We affirm.

In Knutson v. State, 736 P. 2d 775 (Alaska App. 1987), we concluded that AS 11.16.110, which provides for legal accountability of accomplices, applied to fish and game offenses charged under Title 16. Alaska Statute 11.16.110 provides:

> Legal accountability based upon the conduct of another: Complicity. A person is legally accountable for the conduct of another constituting an offense if . . .

> (2) with intent to promote or facilitate the offense, the person . . .
>
> (B) aids or abets the other in planning or committing the offense . . . .

Under this statute, Vaden could be prosecuted for aiding another person in committing a game violation. Vaden's argument, however, is that Snell did not commit any game violations because Snell was authorized by the authorities to engage in what would normally be illegal conduct necessary to carry out his undercover duties. Vaden argues that since Snell committed no crime, Vaden could not be convicted of aiding Snell in illegally taking or illegally transporting that game. The state points to AS 11.16.120 and argues that this statute permits it to prosecute Vaden even if Snell's acts did not constitute a crime because they were authorized by the

state. Alaska Statute 11.16.120 provides, in pertinent part:

> Exemptions to legal accountability for conduct of another.
>
> (a) In a prosecution for an offense in which legal accountability is based on the conduct of another person . . .
>
> (2) it is not a defense that
>
> (A) the other person has not been prosecuted for or convicted of an offense based upon the conduct in question . . .; [or]
>
> (C) the other person is not guilty of the offense . . .

(Emphasis added.)

We have examined several sources in an attempt to deal with the issue of whether an accessory can be prosecuted if the principal has not committed a crime or has a complete defense to the crime.

See Model Penal Code Part 1, Art. 2 § 2.06(7) (1985); G. Fletcher, Rethinking Criminal Law 642-43 (1978); R. Perkins & R. Boyce, Criminal Law 761-64 (3d ed. 1982); 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.8(c) at 159-61 (1986). There appear to be few cases in this area and the commentators appear to have different ways of approaching this issue. However, we believe that Vaden could be prosecuted under the facts of this case.

The first question, as we see it, is to determine whether a crime took place. To give a simple example, if Snell shot a dummy fox, no crime would have been committed. Hence, Vaden could not be prosecuted as an accessory regardless of his actions or his intent. But in this case, we think it is clear that Snell committed the offenses: He shot the foxes from an aircraft and

during a closed season. Snell had a defense of justification, however. He was authorized to commit the crime as part of his undercover assignment.

The next question is whether Vaden should be able to raise Snell's defense of justification, or whether we should hold that the defense was one which only Snell could raise. Vaden knew that Snell shot the foxes illegally, yet he still transported them. We see no reason why Vaden should have a legal justification in this case. Therefore, we hold that Vaden could not raise Snell's defense of justification. The fact that Snell might have a defense to the crime should not excuse Vaden. This holding seems to be consistent with and authorized by AS 11.16.120.

The real issue in this case, and the one upon which this court is divided,

is a public policy issue: should we allow the state to convict Vaden as an accessory to a crime where the principal was a government agent? Vaden argues that his convictions violate the due process clauses of the United States and Alaska Constitutions. Where the undercover agent commits the crime and the defendant is charged as an accessory, there is a clear and obvious potential for overreaching by the government. We believe, however, that any government overreaching is adequately covered by the defense of entrapment. Alaska Statute 11.81.450 provides:

> Entrapment. In any prosecution for an offense, it is an affirmative defense that, in order to obtain evidence of the commission of an offense, a public law enforcement official or a person working in cooperation with the official induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an

> average person, other than one who is ready and willing, to commit the offense. Inducment or persuasion which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit does not constitute entrapment.

The defense of entrapment has been further refined by the supreme court in Pascu v. State, 577 P. 2d 1064, 1067 (Alaska 1978), to focus on whether "[police] conduct falls below an acceptable standard for the fair and honorable administration of justice."

Vaden brought a pretrial motion to dismiss, alleging entrapment and a violation of his due process rights. Snell testified at the pretrial hearing that it was Vaden's initial idea to shoot the foxes. Snell also stated that he shot the foxes under Vaden's specific instructions. Thereafter, District Court Judge John Bosshard, III, denied the

motion to dismiss. Later, at trial, Snell indicated that he merely followed Vaden's instructions and that Vaden showed him how to shoot out of the airplane. Vaden testified at trial, however, that Snell initiated the idea to shoot the foxes and that Vaden agreed only because he weakened.

Judges and juries are constantly called upon to resolve credibility questions. This case is no different. Under these facts, Judge Bosshard could conclude that Vaden had not established an entrapment defense. See Yates v. State, 681 P. 2d 1362, 1364 (Alaska App. 1984) (entrapment an issue for the court, not the jury).

In conclusion, although we believe that convicting Vaden as an accessory, when the principal was an undercover agent for the government, is a cause for

concern, we believe that the defense of entrapment provides an adequate remedy for this type of case. Therefore, we conclude that the trial court did not err in finding that Vaden did not establish entrapment in this case and in concluding that the government's actions did not violate Vaden's right to due process under the United States or Alaska Constitution. We also conclude that the trial court did not err in failing to give Vaden's proposed instructions and in concluding that Vaden could properly be convicted as an accessory in this case.

The conviction is AFFIRMED.

SINGLETON, Judge, concurring.

I agree with Judge Coats' resolution of the issues in this case. Vaden contends that he could not have aided and abetted Snell in committing an unlawful act if Snell's act (shooting the foxes) was lawful. It is not necessary, in my view, to explore the possible criminal liability of an offender who uses an "innocent agent" to accomplish his offense where the "innocent agent" is an undercover police officer because it seems clear to me that Snell's act was not lawful and that, therefore, Vaden could be prosecuted for aiding and abetting him.

Under Alaska law, no one may take fish or game unless expressly authorized to do so by a statute or regulation. State v. Eluska, 724 P. 2d 514, 515 (Alaska 1986). Neither the Board of

Fish and Game nor the executive branch of government can orally authorize the taking of game. See State v. Tanana Valley Sportsmen's Ass'n, 583 P. 2d 854, 858 (Alaska 1978). Vaden has not pointed to any regulation or statute expressly authorizing Snell, or undercover officers in general, to shoot foxes. Consequently, Snell's shooting of the fox was illegal.

Judge Coats may be suggesting, in dicta, that Snell's action might have been excusable under AS 11.81.420.[1] The

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1. Alaska Statute 11.81.420 provides:

(a) Unless inconsistent with AS 11.81.320-11.81.410, conduct which would otherwise constitute an offense is justified when it is required or authorized by law or by a judicial decree, judgment, or order.

(b) The justification afforded by this section also applies when

(Footnote Continued)

applicability of this section has not been briefed, and I have grave reservations regarding the question. It appears clear to me that Snell's act was not authorized by law or by a judicial decree, judgment, or order. AS 11.81.420(a). It is possible that Snell reasonably believed that his conduct was

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(Footnote Continued)

> (1) the person reasonably believes the conduct to be required or authorized by a decree, judgment, or order of a court of competent jurisdiction or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; or
>
> (2) The person reasonably believes the conduct to be required or authorized to assist a peace officer in the performance of the officer's duties, notwithstanding that the officer exceeded the officer's authority.

required or authorized in order to assist peace officers (i.e., Fish and Game officials) in the performance of their duties notwithstanding that those officials exceeded their authority in permitting him to kill animals. AS 11.81.430(b)(2). But cf. Eluska, 724 P. 2d at 515 (refusing to recognize statutory defense permitting taking of animals not specifically authorized by Fish and Game regulations). It is not necessary to pursue this issue further, however, because I agree with Judge Coats that if Snell has a defense under this section, it is a personal defense akin to duress or entrapment which would not insulate an aider or abettor from liability. See, e.g., United States v. Azadian, 436 F. 2d 81 (9th Cir. 1971) (perpetrator of crime of bribing official acquitted on ground of entrapment;

accessory convicted); State v. Harvey, 736 P. 2d 191 (Or. 1987) (perpetrator's defense of duress does not insulate instigator from criminal liability).

I also agree that Vaden cannot prevail on a theory of entrapment. In order to show entrapment, the defendant must establish two steps: that the police engaged in (1) activites which were calculated to seduce or coerce people, who are not otherwise motivated to commit crimes; and (2) the police activities constituted unconscionable conduct; Pascu v. State, 577 P. 2d 1064, 1066-67 (Alaska 1978). Unless the first step is satisfied, the second is never reached. Anchorage v. Flannagan, 649 P. 2d 957 (Alaska App. 1982). Under the subjective theory of entrapment, the focus is on the defendant and whether the police seduced or coerced him. Under the objective

theory, the court looks beyond the immediate parties to the transaction and asks whether the police conduct would be likely to seduce or coerce others ("average" people) into criminal behavior that they would not otherwise commit. In the absence of seduction or coercion, police conduct, no matter how unconscionable, cannot constitute entrapment. Flannagan, 649 P. 2d at 961-62.[2]

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2. Chief Judge Bryner's dissent apparently confuses an entrapment defense for Vaden with a necessity defense for Snell. I agree that Snell had no necessity defense, i.e., his shooting the foxes would not appear to be a "lesser evil" than not shooting them would have been. Compare Nelson v. State, 597 P. 2d 977 (Alaska 1979) (describing the necessity defense in terms of the lesser of two evils). I assume, for purposes of this case, that Snell acted illegally in shooting the foxes. I am convinced, however, that Snell's illegal conduct did not seduce or coerce the conduct of Vaden. The jury had to have found that Vaden's conduct constituted aiding and

(Footnote Continued)

My concern with Judge Coats' opinion may involve too broad a reading; I infer a conclusion that in the absence of entrapment, unconscionable police conduct can never justify dismissal of a charge. We reserved this question in Flannagan, 649 P. 2d at 963. While I would not foreclose the possibility of recognizing a defense of this kind in an appropriate case, I would adhere to Flannagan and refuse to recognize such a

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(Footnote Continued)

abetting Snell. It is important to stress that Vaden's liability is not altogether "vicarious," i.e., resulting solely from his status as an employer or principal. The actus reus of an accomplice's offense involves conduct (i.e., aiding and abetting) different from the petetrator's conduct (i.e., firing the gun which resulted in the foxes' death). Vaden is being prosecuted for his conduct, not Snell's. As we have seen, a finding of "entrapment" involves a two-step process: (1) we must identify specific behavior by undercover police officers, or other agents, of a seductive or coercive nature likely to involve others in criminal behavior and

(Footnote Continued)

defense in the absence of outrageous police conduct "shocking the universal sense of justice and violating the concept of fundamental fairness." Id. at 963. I also think that such a defense would, in effect, involve a prophylactic rule intended by this court to deter such behavior and, as such, should meet the test for prophylactic rules adopted by the Alaska Supreme Court in Copelin and Sundberg. See, e.g., Copelin v. State, 659 P. 2d 1206, 1214-15 (Alaska 1983); State v. Sundberg, 611 P. 2d 44 (Alaska 1980). While Copelin and Sundberg deal with a prophylactic rule involving suppression of evidence, it seems to me

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(Footnote Continued)

(2) Where such behavior exists, we must evaluate it to determine whether it falls below an acceptable standard for the fair and honorable administration of justice. Pascu, 577 P. 2d at 1067. Since Snell did not engage in behavior likely to seduce or coerce Vaden's conduct, we

(Footnote Continued)

that similar considerations should govern prophylactic rules requiring dismissal of charges. With these considerations in mind, it is clear to me that Vaden should not prevail since the need to deter Snell, and those similarly situated, from engaging in such behavior, would not appear to outweigh the need to prosecute Vaden, and those similarly situated, for their criminal conduct.

Snell's willingness to shoot foxes does not appear to me to be the kind of outrageous police conduct warranting a prophylactic rule of dismissal. While

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(Footnote Continued)

never reach the second step. Flannagan, 649 P. 2d at 962-63.

Entrapment, even under the objective formulation utilized in Alaska, addresses some, but not all, of the potential problems associated with the use of undercover officers as agents provocateurs. While I would not rule out recognition of a broader defense in an appropriate case, I think it confuses the

(Footnote Continued)

one could conceive of overzealous Fish and Game officers slaughtering the animals they have sworn to protect in a misguided effort to identify lawless hunting guides, it does not appear on this record that killing of animals by law enforcement officers engaged in undercover activity is widespread. Nor does it appear that Snell set out with the intent to kill animals, though the possibility that he would kill them was certainly foreseeable. Under the circumstances, I would not establish a prophylactic rule of dismissal. Sundberg, 611 P. 2d at 50-53.

(Footnote Continued)

issue to confound such a new defense with entrapment. For reasons set out in the text of this decision, I do not believe that this case is appropriate for establishing an expanded defense.

BRYNER, Chief Judge, dissenting.

I agree with Judge Coats and Singleton in rejecting Vaden's assertion that his conviction was barred because no offense was actually committed. I would, however, find that Snell's conduct in this case "[fell] below an acceptable standard for the fair and honorable administration of justice." Pascu v. State, 577 P. 2d 1064, 1067 (Alaska 1978). Vaden's conviction should therefore be reversed.

The state's effort to ferret out crime consisted of Snell's shooting foxes as a means of convicting Vaden vicariously for the shooting of those very same foxes. All of Vaden's convictions stemmed directly from the shooting of foxes by Snell. The evil committed by the state's agent was thus

plainly equivalent to, or greater than, the evil for which Vaden was convicted. Under these peculiar circumstances, I do not believe Vaden's conviction can properly stand.

The state, of course, attempts to characterize Snell's conduct as being necessary in order to secure evidence of Vaden's participation in an ongoing pattern of more serious fish and game offenses. This explanation would, in my view, be persuasive with respect to charges involving additional, more serious crimes; in my view Pascu would not have precluded Vaden's conviction for any such additional charges.[1] In fact, however, Vaden was acquitted of all charges except those stemming directly

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1. Similarly, I would not have precluded the state from prosecuting and convicting Vaden for the crime of solicitation, the commission of which would not have been dependent upon Snell's shooting of the foxes.

from Snell's shooting of the foxes. This outcome precludes Snell's conduct from being regarded as a lesser evil that was necessary to accomplish some greater good.

I therefore dissent.

I certify that this is a true, full copy of an original document on file in the Appellate Courts of the State of Alaska.

DATED: March 30, 1989, at Anchorage, Alaska.

CLERK OF THE APPELLATE COURTS

BY: /s/
CAROL L. VANCE
Deputy Clerk

Filed in the District Courts State of Alaska January 27, 1986

Clerk of the District Court by_____ Deputy

IN THE DISTRICT COURT FOR THE STATE OF ALASKA AT GLENNALLEN

STATE OF ALASKA	) **consolidated for
	)
vs.	) sentencing**
	)
DOUGLAS B. VADEN,	) Judgment Count
	)
	) 5,9,18,19,20,21,22
	)
	) 23,24,25,35,36,37
	)
	)
	) Case No. 3GL-S84-52 Cr.

DOB: 3/27/18

DATE OF OFFENSE: October '83; April '84

STATUTE OR ORD. See attached information

CRIME CHARGED: See attached information

TRIAL: Jury

The defendant was found and adjudged:

Guilty of the crime named above.

Any appearance bond in this case in exonerated.

SENTENCE

X Sentence is imposed as follows:

X Defendant is committed to the custody of the Department of Corrections Commissioner of Health and Social Services to serve 180 days with 180 days suspended.

X Defendant is ordered to forfeit piper super cub N4372A to the State.

X Defendant is placed on probation until January 24, 1988

X Defendant's Hunting license or privilege to apply therefor is revoked for TWO (2) years and any

such license is to be immediately surrendered to the court.

License Number: NOT ISSUED

X The conditions of defendant's probation are: (1) NO FISH AND GAME VIOLATIONS

*** Sentence is stayed pending appeal and motion hearing ***

Effective Date: January 24, 1986

BY: /s/ SHELDON S. SPRECKER

SHELDON S. SPRECKER

Judge

COUNTS CHARGED ON INFORMATION

COUNT 5: AID AND ABET HUNTER TO TAKE CARIBOU SAME DAY AIRBORNE
5AAC 81.075(a)(4)

COUNT 9: POSSESSION AND TRANSPORTATION OF CARIBOU TAKEN SAME DAY AIRBORNE 5AAC 81.140(c)

(COUNTS 5 AND 9 ARE NOT APPLIABLE TO THIS CASE)

COUNT 18: AT 11:30 A.M., AID AND ABET HUNTER TO TAKE A FOX FROM AN AIRCRAFT
5AAC 81.072(4)

COUNT 19: AT 12:30 P.M., AID AND ABET HUNTER TO TAKE A FOX FROM AN AIRCRAFT
5AAC 81.072(4)

COUNT 20: At 1:30 P.M., AID AND ABET HUNTER TO TAKE A FOX FROM AN AIRCRAFT
5AAC 81.072(4)

COUNT 21: At 1:40 P.M., AID AND ABET HUNTER TO TAKE A FOX FROM AN AIRCRAFT

5AAC 81.072(d4)

COUNT 22: AT 11:30 A.M., AID AND ABET HUNTER TO TAKE A FOX DURING A CLOSED SEASON

5AAC 81.330(4) UNIT 12

COUNT 23: AT 12:30 P.M., AID AND ABET HUNTER TO TAKE A FOX DURING A CLOSED SEASON

5AAC 81.330(4) UNIT 12

COUNT 24: AT 1:30 P.M., AID AND ABET HUNTER TO TAKE A FOX DURING A CLOSED SEASON

5AAC 81.330(4) UNIT 12

COUNT 25: AT 1:40 P.M., AID AND ABET HUNTER TO TAKE A FOX DURING A CLOSED SEASON

5AAC 81.330(4) UNITE 12

COUNT 35: POSSESSION AND TRANSPORTATION BY A SUPER CUB AIRCRAFT OF A FOX TAKEN AT APPROXIMATELY 12:30 P.M. FROM AN AIRCRAFT AND DURING A CLOSED SEASON
5AAC 81.140(c)

COUNT 36: POSSESSION AND TRANSPORTATION BY A SUPER CUB AIRCRAFT OF A FOX TAKEN AT APPROXIMATELY 1:30 P.M. FROM AN AIRCRAFT AND DURING A CLOSED SEASON
5AAC 81.140(c)

COUNT 37: POSSESSION AND TRANSPORTATION BY A SUPER CUB AIRCRAFT OF A FOX TAKEN AT APPROXIMATELY 1:40 P.M. FROM AN AIRCRAFT AND DURING A CLOSED SEASON
5AAC 81.140(c)

APPENDIX B

CONSTITUTION, STATUTES, AND REGULATIONS.

UNITED STATES CONSTITUTION

The Fourteenth Amendment to The United States Constitution provides in part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law...

UNITED STATES STATUTES

28 USC 1257(a) provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

AS 16.05.420 provides:

> Violations. (a) A false statement as to a material fact in an application for license makes the license issued upon it void. A person who knowingly makes a false statement or knowingly omits a material fact in an application violates AS 16.05.330 - 16.05.430.
>
> (b) A person to whom a license or tag has been issued under this chapter may not alter, change, loan, or transfer the license or tag. A person may not use a license or tag that has been issued under this chapter to another person.

AS 16.05.430 provides:

> Penalties: (a) A person who violates AS 16.05.330 - 16.05.420 is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1000, or by imprisonment for not more than six months, or by both.
>
> (b) The proceeds of all fines shall be transmitted by the court to the proper state officer for deposit in the general fund of the state.

AS 16.05.900 provides:

> Penalty for violations. (a) A

person who violates AS 16.05.870 - 16.05.895 or 16.05.920 or any regulation adopted under this chapter is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $1000 or by imprisonment for not more than six months, or by both. A person who violates a regulation adopted under this chapter for the regulation of commercial fisheries shall be punished as provided in AS 16.05.720.

ALASKA ADMINISTRATIVE REGULATIONS

5 AAC 81.072(4) provides, in part:

The following methods and means of taking game are prohibited, unless otherwise provided in this Chapter: from any mechanical vehicle.

5 AAC 81.330(4) provides in part:

Fur animal hunting: open season unit 12, fox, red (including cross, black or silver phases) November 1st to February 15th.

5 AAC 81.140(c) provides, in part:

No person may possess or transport game or parts of game that the person knows were taken in violation of AS 16. or regulation promulgated thereunder.